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Supreme Court of the United States

OCTOBER TERM, 1935

No. 4

PETER VAN DER WEYDE, Petitioner,

vs.

OCEAN TRANSPORT COMPANY, LTD., A CORPORATION, CLAIMANT OF THE STEAMSHIP "TAIGEN MARU", ETC., Respondent

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Upon Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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Brief of Respondent

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Brief of Respondent

QUESTION FOR REVIEW

By this court writ of certiorari has been granted to the Circuit Court of Appeals for the Ninth Circuit—"limited to the question of the application to this controversy of the Treaty of Commerce and Navigation of July 4, 1827, between the United States and the Kingdom of Sweden and Norway (8 Stat. 346)."

TREATY INVOLVED

For convenient reference the portion of that Treaty vital to consideration is quoted:

> "Article XIII. Each of the high contracting parties grants to the other the privilege of appointing, in its commercial ports and places, consuls, vice consuls, and commercial agents, who shall enjoy the full protection and receive every assistance necessary for the due exercise of their functions; but it is expressly declared that in case of illegal or improper conduct with respect to the laws or Government of the country in which said consuls, vice consuls, or commercial agents shall reside, they may be prosecuted and punished conformably to the laws, and deprived of the exercise of their functions by the offended Government, which shall acquaint the other with its motives for having thus acted; it being understood, however, that the archives and documents relative to the affairs of the consulate shall be exempt from all search and shall be carefully preserved under the seals of the consuls, vice consuls, or commercial agents, and of the authority of the place where they may reside.
>
> "The consuls, vice consuls, or commercial agents, or the persons duly authorized to supply their places, shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the order or tranquility of the country, or the said consuls, vice consuls, or commercial agents should require their assistance to cause

their decisions to be carried into effect or supported. It is, however, understood that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country."

"Article XIV. The said consuls, vice consuls, or commercial agents are authorized to require the assistance of the local authorities for the arrest, detention, and imprisonment of the deserters from the ships of war and merchant vessels of their country; and for this purpose they shall apply to the competent tribunals, judges, and officers, and shall in writing demand said deserters, proving, by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews, and on this reclamation being thus substantiated, the surrender shall not be refused.

"Such deserters, when arrested, shall be placed at the disposal of the said consuls, vice consuls, or commercial agents, and may be confined in the public prisons, at the request and cost of those who claim them, in order to be sent to the vessels to which they belonged or to others of the same country. But if not sent back within the space of two months, reckoning from the day of their arrest, they shall be set at liberty and shall not be again arrested for the same cause.

"It is understood, however, that if the deserter should be found to have committed any crime or offense, his surrender may be delayed until the tribunal before which the case shall be depending shall have pronounced its sentence and such sentence shall have been carried into effect."

Treaties and Other International Acts of the United States of America, by Miller, Vol. 3, pp. 292, 294.

STATEMENT OF THE CASE

The essential, undisputed facts of this controversy are as follows:

Peter Van der Weyde, the petitioner, being a subject of the Netherlands, during 1922 in Oregon signed Norwegian articles of employment for a trans-Pacific voyage as a member of the crew of the Norwegian steamship "Luise Nielsen," therein expressly agreeing that his rights and obligations during employment be governed by the Norwegian law, and that any dispute be decided by the Norwegian Consul, and not by any foreign court in a foreign country.

Shortly after the termination of said voyage, on September 15, 1922, admiralty libel *in rem* against said vessel was filed in the District Court for Oregon by petitioner, who sought recovery of damages for personal injuries, claimed to have been suffered aboard in May, 1922, while on the high seas in the course of said voyage, returning from the Orient, six days before arrival at destination, as the result of unwholesome food and as the result of a fall through an open, unguarded, unlighted hatch. Such libel, after intervention and protest by the Norwegian Consul, resident at Portland, and after issues joined and testimony taken, was dismissed by the District Court for Oregon in May, 1924.

Also shortly after the termination of said voyage said Norwegian Consul, in recognition of his official duties, promptly attended petitioner in connection with such personal injuries and caused approximately $2000 to be expended in his behalf for hospitalization and other necessities, at the expense of the Norwegian steamship owner and the Norwegian government.

On April 18, 1931, in the District Court for Washington, petitioner instituted this cause, by filing similar admiralty libel *in rem* against the same vessel, seeking recovery of damages for the same personal injuries, and alleging the same cause of action.

Prior to said libel in this cause, title to said vessel was transferred by B. Stolt Nielsen & Co., Inc., the Norwegian owner, to the Ocean Transport Company, Ltd., a Japanese corporation, under bill of sale containing warranty that said vessel was "free from all debts and encumbrances"; and incident to such sale said vessel was renamed the "Taigen Maru."

In this cause, after intervention and protest of the Norwegian Consul resident at Seattle, the District Court for Washington dismissed the libel, ruling that, under all circumstances, in the exercise of its discretion jurisdiction should not be maintained for a hearing upon the merits. Later the Circuit Court of Appeals affirmed the dismissal upon the ground, first

urged on appeal, that jurisdiction was wholly non-existent because of Article XIII of the Treaty of 1827—concluding it "unnecessary to consider other points argued in the briefs."

ARGUMENT

Upon the background reflected by the foregoing summary, this court has required discussion of the jurisdiction of the District Court sitting in admiralty over this controversy, as affected by the Treaty of 1827.

The petition initiating this review contains implied admission that as long as this treaty remained effective it clothed Norwegian consuls with sole jurisdiction sufficiently broad to include a dispute like the present. The petition (p. 6) puts the query, "whether or not the provisions of this treaty have not been abrogated by the adoption of the Seaman's Act." It inferentially assumes that, while continuing in force, the treaty was operative to confine jurisdiction in this general class of cases to the foreign consular officials.

Likewise the typewritten brief (pp. 15, 17) in support of the petition, asserts the contention of abrogation of the treaty by the Seaman's Act of 1915, in

an atmosphere of like tacit concession, without suggestion that the terms of the treaty were no comprehensive enough to cover a claim of this character.

Such a premise in entering a consideration of the jurisdictional question seems justified by the plain language of Article XIII of the Treaty of 1827, by similar provisions of Article V in the prior Treaty of 1816 with the Kingdom of Sweden and Norway, by comparable terms (*) in treaties with other nations, by the resultant practices, and, lastly, by decisions of the admiralty courts of this country.

Foreign consular jurisdiction, when vested by treaty, was recognized by this court in an opinion saying:

> "Of course, if any treaty stipulations exist between the United States and the country to which a foreign ship belongs with regard to the right of the consul of that country to adjudge controversies arising between the master and crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations should be fairly and faithfully observed."
>
> *The Belgenland*, 114 U. S. 355, 364; 29 L. Ed. 152, 155.

(*) See: Wildenhus' case, 120 U. S. 1; 30 L. Ed. 567, 568. Also see: Austria-Hungary 1848, Article IV; Austria-Hungary 1870, Article XI; Belgium 1880, Article XI; Colombia 1850, Article III, subd. 8; Denmark 1861, Article I; France 1853, Article VIII; Germany 1871, Article XII; Greece 1901, Article XII; Italy 1878, Article XIII; Italy 1881; Netherlands 1878, Article XI.

Later this court, in a criminal case, when considering treaty provisions similar to Article XIII of the Treaty of 1827, approved exclusive jurisdiction of foreign consults as to civil matters in the following language:

> "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquility of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions." * * *

"The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction."

Wildenhus' case, 120 U. S. 1; 30 L. Ed. 565, 567, 569.

More recently the same doctrine has been repeated.

"In the absence of treaty stipulation, the courts of admiralty of the United States have jurisdiction of all matters appertaining to a foreign ship while in the ports of this country. (Citations.)"

Heredia v. Davies, 12 Fed. (2d) 500, 501. (C. C. A. 4).

In the case of *The Rindjani*, 254 Fed. 913 (C. C. A. 9), it was squarely held that the admiralty courts of this country had no jurisdiction of a libel by a Dutch seaman to recover the cost of return transportation, under shipping articles signed with a Dutch vessel, because of the exclusive consular jurisdiction granted by Article XI of the Treaty of 1878 with the Netherlands.

In denying a wage claim to a Prussian seaman against a vessel of the same nationality, the Circuit Court gave effect to the Prussian Treaty of 1828

granting sole consular jurisdiction, with the conclusion:

> "But I am constrained to the conclusion, that the treaty required that this matter in difference should have been left where, I think, the treaty with Prussia leaves it—in the hands, and subject to the determination, of their own public officer. The necessary result is the dismissal of the libels."
>
> *The Elwine Kreplin*, Fed. Cas. 4426 (C. C.).

In the decisions of the lower federal courts the same principle has been declared.

The Treaty of 1871 with Germany was held to confer like consular judicial powers, by an opinion which said:

> "For this court to undertake to settle the dispute between the parties, and to determine the question of libelants' right to their discharge under the contract, and hence of their right to wages, would require a consideration and construction of the contract by the court, which, under the treaty, the court has not the jurisdiction to do. And while I may be of opinion, as I construe the shipping articles produced, that under them libelants are entitled to be discharged at this port, still the court has, as I have said, no jurisdiction so to adjudicate, but must remit the matter to the consul. *The Elwine Kreplin*, 9 Blatchf. 439. It is therefore ordered that the libel be dismissed."
>
> *The Buchard*, 42 Fed. 608 (D. C.).

Article XIII of the Norwegian Treaty of 1827 was determined to withhold jurisdiction from the admiralty courts with respect to a claim against a Norwegian vessel by an alien seaman signing articles in an American port, the opinion containing the following language:

> "This is the very case provided for in the treaty, of which the consul is thereby made the 'judge and arbitrator'; and this court, being a local authority, is prohibited from interfering with him. But it is contended that the treaty does not apply to an American citizen shipped at an American port on a Norwegian vessel, and, assuming that the libelant is such citizen, the consul has no jurisdiction and this court has."
>
> * * *
>
> "The treaty of 1827 is a law of that kingdom, and by it the consuls of that country are given exclusive jurisdiction of all 'differences'—controversies—between the captain and crew of a Norwegian vessel. This, in effect, forbids—disables—the libelant from resorting to any other tribunal for the settlement of such 'difference.' The treaty is also a law of the United States, and forbids this court from interfering in a case of a 'difference' between the master and crew of a Norwegian vessel."
>
> *The Marie*, 49 Fed. 286, 288.

The Treaty of 1827 was again invoked with the same result as to the libel of a citizen of the United States, signing articles on a Norwegian vessel in an American port, who demanded damages for being put

ashore in manacles. The protest of the Norwegian Consul was granted against jurisdiction of the admiralty court, by an opinion stating:

> "The earnest desire of this court to afford to seamen every right and protection authorized by the law, and the sympathy I have with that class of people to which libelant belongs, strengthened by the able and impressive argument of his counsel, induced me to take for examination and careful consideration the matter and argument submitted, before a decision by the court denying the jurisdiction prayed for; but the consideration has only served to confirm the correctness of the decision of this court in the case of *The Burchard*, 42 Fed. Rep. 608, where it was held that one court had no jurisdiction in a case very similar to this one. In addition to that case, I cite, as sustaining the decision in this, *The Salomoni*, 29 Fed. Rep. 534; *The Marie*, 49 Fed. Rep. 286; *The Elwine Kreplin*, 9 Blatchf. 438; *In re Ross*, 140 U. S. 453, 11 Sup. Ct. Rep. 897."

The Welhaven, 55 Fed. 80, 81.

In a case involving the Treaty with Germany of 1871, upon a claim by a German seaman against a German vessel the court's opinion uses the following language:

> "A fair and faithful observance of the treaty stipulations would plainly forbid such interference by a German court, and equally forbids this court to take jurisdiction of the present case."

The Bound Brook, 146 Fed. 160, 165 (D. C.).

Once more the same Treaty of 1827 was reviewed with equal effect upon a libel by a German seaman against a Swedish vessel for personal injuries suffered in an American port. In concluding that Article XIII deprived the federal court of judicial authority, the opinion is too extended for full quotation, but in small part it said:

> "Where treaty stipulations exist, however, with regard to the right of the consul of a foreign country to adjudge controversies arising between the master and the crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations are the law of the land, and must be fairly and faithfully observed."
>
> *The Ester*, 190 Fed. 216, 221.

Of much more recent date is the ruling in a case involving a suit by a German seaman against a Greek vessel, where the treaty provision was similar to that of the Norwegian Treaty of 1827. The court's expression was as follows:

> "The exclusion of the jurisdiction of the court, under the language of the Convention, provides that the consular officer of respective nations shall alone take cognizance over differences between the captains, officers and crew, particularly in reference to the adjustment of wages, and no distinction is made between Greek seamen and other seamen upon Greek vessels. The want of jurisdiction is not subject to the discretion of the court on the ground that the libelant is a German not a Greek seaman."
>
> *The Cambitsis*, 14 Fed. (2d) 236, 237.

In further considering "the application to this controversy of the Treaty of Commerce & Navigation of July 4, 1827", discussion is appropriately directed to the time and manner of effective termination, abrogation or modification of Article XIII.

The status of a treaty in the jurisprudence of this country is determined by the Constitution in Article VI, which says in part:

> "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. * * *"

In construing this provision this court has held that statutes of Congress and treaties of this nation are on a parity.

Cherokee Tobacco v. U. S., 11 Wall 616, 20 L. Ed. 227;

Thomas v. Gay, 169 U. S. 264, 42 L. Ed. 740;

Rainey v. U. S., 232 U. S. 310, 58 L. Ed. 617.

In the first of these cases the opinion uses the following expression:

> "A treaty may supersede a prior act of Congress and an act of Congress may supersede a prior treaty."

Cherokee Tobacco v. U. S., 11 Wall 616, 619, 20 L. Ed. 227, 229.

Treaties, like statutes, may be superseded by subsequent provisions of express annulment or of necessary unavoidable inconsistency. But under principles of construction and in deference to international obligations recognized by this court, it refuses to adjudge a treaty vitiated by a later statute of Congress unless the will and the expression of the sovereign are clear. Reflecting such attitude, this court has said:

> "* * * it is the duty of the courts not to construe an Act of Congress as modifying or annulling a treaty made with another nation, unless its words clearly and plainly point to such a construction. (Citations.)"
>
> *Lem Moon-Sing v. U. S.*, 158 U. S. 538, 549, 39 L. Ed. 1082, 1086.

Elsewhere the same doctrine has been expressed.

> *Karnuth v. U. S.*, 279 U. S. 231, 235, 73 L. Ed. 677, 679;
>
> *Cook v. U. S.*, 288 U. S. 102, 120, 77 L. Ed. 641, 650.

Reaching the question of whether Article XIII of the Treaty of 1827 became inapplicable to this controversy by statutory supersession, petitioner's contentions are almost wholly tacit. The petition (p. 6) barely suggests the query of abrogation by the Seamen's Act of 1915. The brief (pp. 15, 17) in support of the petition merely asserts displacement of

the Treaty provisions by that statute without persuasive argument or substantiating authority.

However, in the absence of pointed disclosed attack upon the ruling of the Circuit Court of Appeals, under review, respondent broadly submits that the Seamen's Act of March 4, 1915, did not effectively supersede all of Article XIII of the Treaty of 1827; and contends that sufficient of the exclusive consular jurisdiction, granted therein, continued to withhold from the federal district courts like jurisdiction over this cause. Reasons:

1st: The Seamen's Act did not in explicit, express terms specifically direct the abrogation of Article XIII;

2nd: The Seaman's Act was not so necessarily and unavoidably inconsistent with all of the provisions of Article XIII as to require its entire abrogation;

3rd: The diplomatic negotiations by the State Department attempting to effect abrogation of the whole of Article XIII were in excess of Congressional direction and in violation of constitutional authority.

The Seaman's Act of 1915 (38 Stat. Ch. 153, p. 1164, sections 1 to 20) is too extended to permit of full quotation. However, careful reading substantiates the assertion that it did not particularize with

any numerical designation of Article XIII of the Treaty of 1827 as one condemned to elimination.

Whether one or more sections of the Seaman's Act were so necessarily and unavoidably inconsistent with Article XIII as to compel its entire abrogation requires some analysis of the provisions of the legislation and of the terms of that portion of the Treaty of 1827.

Article XIII of the treaty deals with consular agents, their appointment, rights, duties, immunities and their jurisdiction in general.

Article XIV deals with deserting seamen, their arrest and imprisonment by local authorities and special consular jurisdiction in connection therewith. In passing, to discard Art. XIV from intimate consideration, it is conceded that this portion of the Treaty was in terms inapplicable to this controversy, and was effectively annulled by unmistakable Congressional direction in Section 16 and Section 17 of the Seaman's Act, followed by State Department diplomatic correspondence in behalf of the President.

However, Article XIII, being in terms directly applicable to this cause, its scope invites examination.

Its first paragraph permits consular appointments, guarantees consular protection, promises local assist-

ance in their functions, allows prosecution of consular agents for violation of domestic laws, and yields immunity to consular archives against search or destruction. Was it the intention of the Seaman's Act of 1915 to abolish all consular representation as to Norway and a number of other nations having comparable articles in their existing treaties? Any reading of that statute resolves this question into a negation. Nevertheless, with no other authority than the Seaman's Act, the Secretary of State attempted to abrogate this first paragraph of Article XIII of the Treaty of 1827, and similar provisions of treaties with other countries. Such an assertion calls for verification, to be found in the closing official communication from the State Department to the Norwegian Minister, dated February 27, 1919, which finally concluded the negotiations by saying: "that Articles 13 and 14 of the Treaty of 1827 being in conflict with the provisions of the Act mentioned were terminated on July 1st 1916." (Foreign Relations of the United States, 1919, p. 53.)

Coming to a scrutiny of the second paragraph of Article XIII, it grants to consuls power to sit as judges and arbitrators, with jurisdiction in such differences as may arise between the captains and crews —without the interference of local authorities, in the

absence of disturbance to the order or tranquillity of the local country, unless required by such consuls to effect or support their decisions—saving to claimants appellate right to resort to the courts of their own nation. As already observed, the consular jurisdiction here conferred was general within the consular field of administration. The particular power and right to arrest and imprison deserting seamen and to enlist local authorities in assistance was separately granted in Article XIV. The consular tribunal derived its broad jurisdiction over visiting vessels and their internal affairs from Article XIII, permitting the consuls to settle differences concerning: wages paid or to be paid; hours of work and rest; duties and discipline; food, slop-chest and quarters; working conditions; fitness of men and seaworthiness of ship; employment, discharge and transportation; illness and injury; construction of the laws of the ship's flag and interpretation of customs and practices foreign to the local authorities.

This suggestive and inadequate listing of the subjects of probable dispute within the consular jurisdiction granted by Article XIII is sufficient to throw into marked contrast the narrower scope of any sections of the Seaman's Act of 1915, which, in terms, or by adjudication binding on this court, are operative as to foreign vessels and foreign crews.

The Seaman's Act abolished arrest and imprisonment of deserting seamen and withdrew cooperation of domestic authorities from foreign consuls by sections 16 and 17, thus necessitating the abrogation of Article XIV of the Treaty.

The Seaman's Act, through Section 4, also added to the foreign seamen's rights, the privilege of resort to our admiralty courts to demand half wages while they and their vessels were present in American ports.

Strathearn S. S. Co. v. Dillon, 252 U. S. 348, 64 L. Ed. 607;

Thompson v. Lucas, 252 U. S. 358, 64 L. Ed. 612.

The Seaman's Act, in Section 11, also protected foreign seamen from certain domestic abuses by prohibiting advances and restricting allotment of wages while in American ports.

Sandberg v. McDonald, 248 U. S. 184, 63 L. Ed. 200;

Jackson v. The Archimedes, 275 U. S. 463, 72 L. Ed. 374.

But as far as yet adjudged by this court most of the provisions of the Seaman's Act relate to American seamen. And likewise as far as yet declared by this court most of the consular jurisdiction conferred by Article XIII is remotely beyond the express provisions

of the Seaman's Act and equally far from any evident contemplation thereof.

> "It is true the act provides for the abrogation of inconsistent treaty provisions, but this provision has ample application treating the statute to mean what we have here held to be its proper construction. It abolishes the right of arrest for desertion. It gives to the civil courts of the United States jurisdiction over wage controversies arising within our jurisdiction. These considerations amply account for the treaty provision. See Treaties in Force, 1904 Ed. index, p. 969."
>
> *Sandberg v. McDonald*, 248 U. S. 184, 198, 63 L. Ed. 200, 204.

Judicial construction by this court limiting the modifying effect of the Seaman's Act upon Article XIII is in harmony with Congressional intent, as plainly disclosed in a view of that statute as a whole, and as particularly emphasized by the presence of Section 8 and Section 5 therein. These sections force the conclusion that Congress never intended to wipe out all consular jurisidiction.

Section 8 reaffirms limited consular power by amending Rev. Stat. Section 4600, for the purpose of eliminating the former duty of reclamation of deserting seamen. The provisions of Section 8 imply a background elsewhere of general consular jurisdiction because they prescribe a method of enforcing consular rulings as to insubordination.

Quite like Section 8 in nature, Section 5 infers the presence of general consular authority, and outlines procedure for dealing with claims of unseaworthiness of vessels.

Not only viewed from within the Seaman's Act itself, but also examined from without, the Congressional intent not to abolish consuls or terminate their jurisdiction (except as to the arrest and imprisonment of deserting seamen, as to demands for half wages in American ports, and as to prohibition against advances of wages in American ports) seems evident. In 1864 Congress enacted legislation (13 Stat. 121, Ch. 116, continued at present as 22 U. S. C. A. Sections 256, 257 and 258) insuring the faithful observance of consular treaties, establishing consular jurisidiction, and providing procedure in exercise thereof. Except for the elimination from Section 258 (formerly Rev. Stat. Section 4081) of power and duty as to arrest and imprisonment of deserting seamen by Section 17 of the Seaman's Act, this early legislation has continuously declared a Congressional purpose to preserve consular jurisdiction, which is entirely consistent with the retention thereof in Article XIII of the Treaty of 1827, and in other similar conventions.

In this surrounding of legislation in and out of the Seaman's Act of 1915, this court should not be reluc-

tant to reconcile its provisions with a continuation of consular jurisdiction in Article XIII, by maintaining its own interpretive point of view thus expressed:

"* * * Courts will always endeavor to construe them (statutes and treaties) so as to give effect to both."

Whitney v. Robertson, 124 U. S. 190, 194; 31 L. Ed. 386, 388.

"But the intention to abrogate or modify a treaty is not to be lightly imputed to Congress."

Pigeon, etc., Co. v. Cox, 291 U. S. 138, 160; 78 L. Ed. 695, 705.

"A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."

Cook v. United States, 288 U. S. 102, 120; 77 L. Ed. 641, 650.

"But, even in the case of statutes, whose repeal or modification involves no question of good faith with the government or People of other countries, the rule is well settled that repeals by implication are not favored and are never admitted where the former can stand with the new Act. *Ex parte Yerger*, 8 Wall. 105 (75 U. S. XIX., 339). In *Wood v. U. S.*, 16 Pet. 362, Mr. Justice Story, speaking for the court upon a question of the repeal of a statute by implication, said: 'That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or

even all, of the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy.' In *State v. Stoll*, 17 Wall. 430 (84 U. S., XXI, 654), the language of the court was that 'It must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be.' See also *Ex parte Crow Dog*, 109 U. S. 570 (XXVII, 1035); *Arthur v. Homer*, 96 U. S. 140 (XXIV, 812); *Harford v. U. S.*, 8 Cranch, 109.

"When the Act of 1882 was passed, Congress was aware of the obligation this Government had recently assumed, by solemn Treaty, to accord to a certain class of Chinese laborers the privilege of going from and coming to this country at their pleasure. Did it intend, within less than a year after the ratification of the Treaty and without so declaring in unmistakable terms, to withdraw that privilege by the general words of the 1st and 2d sections of that Act? Did it intend to do what would be inconsistent with the inviolable fidelity with which, according to the established rules of international law, the stipulations of treaties should be observed? These questions must receive a negative answer."

Chew Heong v. U. S., 120 U. S. 536, 549, 550; 28 L. Ed. 770, 773, 774.

" * * * and while the Allotment Act, being later, must control in case of conflict, it should be harmonized with the letter and spirit of the

treaty so far as that reasonably can be done, since an intention to alter, and, pro tanto, abrogate the treaty, is not to be lightly attributed to Congress. * * * It follows that if the Allotment Act is now construed to exclude such lands from allotment, a materially restrictive change will have been wrought in the terms of the treaty. Such a construction is to be avoided, if possible."

U. S. v. Payne, 264 U. S. 446, 449; 68 L. Ed. 782, 784.

"It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute."

"The same rules have been applied where the claim was that an act of Congress had abrogated some of the provisions of a prior treaty between the United States and China. Chew Heong v. United States, 112 U. S. 536, 550, 28 L. Ed. 770, 774, 5 Sup. Ct. Rep. 255. In that case it was held that the treaty could stand with the subsequent statutes, and, consequently, it was enforced.

"Like principles must control when the question is whether an act of Congress has been superceded in whole or in part by a subsequent treaty. A statute enacted by Congress expresses the will of the people of the United States in the most solemn form. If not repugnant to the Con-

stitution, it is made by that instrument a part of the supreme law of the land, and should never be held to be displaced by a treaty, subsequently concluded, unless it is impossible for both to stand together and be enforced. So far from there being any inconsistency between the statute and treaty here in question, the 12th section of the act of 1882, as amended in 1884, and continued in force for ten years from and after the passage of the act of 1892, is in absolute harmony with the treaty, and can be enforced without affecting or impairing any right secured by the treaty. On the contrary, the enforcement of that section as amended will serve to advance the purpose of the two countries in respect of Chinese laborers, as avowed in the treaty of 1894. Despite the ingenious argument to the contrary, we do not perceive any difficulty whatever in reaching this conclusion, after carefully scrutinizing the treaty and the statute. A different conclusion would be hostile to the objects which, as avowed in the treaty, both the United States and China desired to accomplish. This is so clearly manifest that argument cannot, as we think, make it more so."

United States v. Lee Yen Tai, 185 U. S. 213, 222; 46 L. Ed. 878, 883.

"As stated by Chief Justice Marshall in Murray v. The Charming Betsy, 2 Cranch 64, 118, 2 L. Ed. 208, 228 * * * an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."

Cunard Steamship Co. v. Mellon, 262 U. S. 100, 132; 67 L. Ed. 894, 906.

"In reaching that conclusion the court seemed of opinion that if the statute were so construed

as to exclude the aliens, it would be in conflict with Article III of the Jay Treaty of 1794, 8 Stat. at L. 116, 117, a result, of course, to be avoided, if reasonably it can be done."

Karnuth v. U. S., 279 U. S. 231, 235; L. Ed. 677, 679.

The decisions of this court have not construed the Seaman's Act of 1915 as modifying Article XIII of the Treaty of 1827 to any greater degree than determined by the Circuit Court of Appeals in this cause, or contended by respondent.

Sandberg v. McDonald, 248 U. S. 184; 63 L. Ed. 200;

Neilson v. Rhine Shipping Co., 248 U. S. 205; 63 L. Ed. 208;

Strathearn Steamship Co. v. Dillon, 252 U. S. 348; 64 L. Ed. 607;

Thompson v. Lucas, 252 U. S. 358; 64 L. Ed. 612;

Jackson v. The Archimedes, 275 U. S. 463; 72 L. Ed. 374.

Since no decision embarrassing to this court stands in the path of approval to the Circuit Court of Appeals' ruling in this cause giving operative effect to Article XIII, discussion need continue only with respect to the interpretation of the Seaman's Act of 1915 in relation to the Treaty of 1827 as applied by the Secretary of State in diplomatic correspondence to execute the will of Congress. (Foreign Relations

of the United States: 1915, pp. 3-12; 1916, pp. 33-42; 1917, pp. 9-20; 1918, pp. 5-9; 1919, pp. 47-54.)

As already confessed, this correspondence culminated in an exchange of notes—the State Department asserting "that Articles XIII and XIV of the Treaty of 1827, being in conflict with the provisions of the act mentioned, were terminated on July 1, 1916"; and the Norwegian Minister asquiescing. (Foreign Relations of the United States, 1919, pp. 53-54.)

However, as abolishing the consular jurisdiction of Article XIII, operative as to this cause, it is contended that the diplomatic relations of the State Department were ineffective to terminate such jurisdiction and revest the same in the admiralty courts of this country, because such negotiations, resulting from a surprisingly loose and inexcusably inaccurate construction of the Seaman's Act, were far in excess of Congressional authority.

Reasons:

(1) The treaty power of the United States is vested in the President and the Senate;

(2) The limited jurisdiction of the district federal courts is derived solely from statutes;

(3) Executive departmental interpretation of its own authority under the constitution is not binding

upon this court any more than Congressional construction of its powers under the constitution.

By the investment of treaty-making power in the President, with the advice and consent of the Senate, through Article VI, Section 2 of the constitution, the Secretary of State was without authority to abrogate Article XIII in toto unless directed by the Seaman's Act. And no negotiations initiated or conducted by the Secretary of State with Norway could return to the federal district courts a portion of their jurisdiction, subject to contraction or expansion only by congressional legislation. In other words, if the action of the State Department (never ratified by the Senate) as to Article XIII was beyond the direction and intent of the Seaman's Act of 1915, such action was not only a misconstruction of that statute, but, in effect, an encrouchment upon constitutional segregation of powers by the executive upon the legislative branch of government—most cancerous when least conspicuous.

The diplomatic correspondence resulting from the passage of the Seaman's Act frequently reflected an understanding of theory of the State Department's limitation of authority, with no discrimination of practice in actual application of the Seaman's Act upon the Treaty of 1927.

In one communication the Secretary of State, on May 29, 1915, said:

> "The period of ninety days thus established will terminate on June first next, and it is therefore necessary that such notice be now given to the government to which you are accredited, in order that negotiations may be instituted looking to an agreement limiting the effect of the denunciation required by law to the operations of the treaty, or treaties, which are found to be in conflict with the provisions of the act. Inasmuch as treaties are contracts between governments, they can only be varied in whole or in part by mutual agreement or special consent. It is the hope, however, of the President that such an agreement can easily be reached which will leave unaffected all parts of the treaties with foreign governments not in consistent with the humanitarian and progressive provisions of the act. * * *
>
> "The President, although deeply anxious that an agreement be reached with foreign governments upon this subject, is not concerned as to the particular method by which it may be consummated, whether by signed protocols of conferences or by mutual exchange of note as is a common practice in the conduct of many diplomatic affairs of this character. The latter course seems preferable because more easily effected, in view of the constitutional requirements that formal agreements between the United States and other countries must be submitted to the Senate of the United States for its advice and consent. In this connection, however, you may point out to the Minister of Foreign Affairs that such reference to the Senate in the case of a mere exchange of notes will not be necessary, and that such an exchange of notes will be regular and effective because of the authority already granted

to the President by Section 16 of the act to abrogate portions of the treaties inconsistent therewith. Hence it will be perceived that the intent of Congress may be fully realized by informal agreements between the government of the United States and other powers, and that in this way the various important treaties now subsisting may remain in full force and effect with the exception of the articles relating to seamen," (*Foreign Relations of the U. S.*, 1915, pp. 6-9.)

Unfortunately for clarity of status as to Article XIII of the Norwegian Treaty of 1827, and like articles in other treaties subjected to attempted abrogation as a result of the Seamen's Act, in adopting the informal methods of diplomatic negotiation suggested by the Secretary of State the direction and intent of Congress was exceeded. The diplomatic correspondence between the Secretary of State and the representatives of numerous other countries attempted to modify treaty provisions not only related to the arrest and imprisonment of deserting seamen and the special jurisdiction of consuls concerning the demands for half wages in American ports and prohibitions against advances and limitations of allotments in American ports, but also attempted to wipe out entirely all jurisdicition of consular tribunals. Regrettably the complete record of diplomatic negotiations engendered by the Seaman's Act of 1915 is too voluminous for quotation here, necessitating merely

reference to source of research. (*Foreign Relations of the United States*: 1915, pp. 3-12; 1916, pp. 33-42; 1917, pp. 91-20; 1918, pp. 5-9; 1919, pp. 47-54.) In relation to the negotiations conducted between the State Department and the Kingdom of Norway, it is interesting to observe that while the Norwegian government did not object to the method of agreement proposed by the State Department, it did react favorably with evident reluctance in regard to the complete abrogation of all provisions in Article XIII.

On December 28, 1917, the Secretary of State addressed a letter to the Minister of Norway, indicating that the government of Norway had found itself unable to agree with proposals respecting the elimination of Articles XIII and XIV from the Treaty of 1927. (*Foreign Relations of the U. S.*, 1918, p. 6.)

On February 5, 1918, the Norwegian Minister of Foreign Affairs replied by communiciation indicating acquiescence as to the elimination of Article XIV, but saying:

> "With regard to the second of the two articles, namely Article XIII, I inquired in the note whether an arrangement conceived in the terms set forth therein (letter of October 29th) would be satisfactory to your government, while reserving to myself the right to revert to the two alternatives of the arrangement in question contained in your note of May last. * * * The Norwegian government has given proof of the ac-

commodating spirit it desires to show in this matter by the fact that the Norwegian legation in Washington, as stated to the American Secretary of State in a note verbale of December 11, 1916, has instructed the Norwegian consuls in the United States not to apply or invoke and treaty stipulations which are inconsistent with the above mentioned act of Congress as long as negotiations are pending in regard to a change in the treaty stipulations. I have the honor to request that you will kindly inform me whether the American government would be willing to explain the objection which it has to the Norwegian government's proposal of October 29th last, concerning Article XIII, as the Norwegian government was of the opinion that such an arrangement would give full assurance of the elimination of any inconsistency between the treaty and the act of Congress." (*Foreign Relations of the U. S.*, 1918, pp. 6-7.)

By communication to the American Minister in Norway, the Secretary of State replied to the Norwegian Minister of Foreign Affairs on May 31, 1918, quoting the Norwegian proposal of October 29th as follows:

"The stipulations contained in the second paragraph of Article XIII of the treaty relative to the right of Norwegian consuls in the United States of America to exercise exclusive jurisdiction without the intervention of the local authorities are subjected to the modification resulting from the fact that Norway has consented to this right being considered as abandoned to the extent that it would otherwise be in conflict with the provisions forming part of Section 4 of the act of Congress of March 4, 1915, entitled the

Seaman's Act. It is understood that the arrangement shall not imply the consent of the Norwegian government to the application to Norwegian vessels of Section 4 referred to." (*Foreign Relations of the U. S.*, 1918, P. 8.)

Sufficient of the correspondence has been quoted to reflect that the Norwegian government was extremly reluctant to yield abrogation of Article XIII. It did so only after he American State Department, without authority of Congressional act and without the advice and consent of the Senate, had issued a notice of denunciation of the entire Treaty of 1827 as a threat of coercion. The negotiation between the State Department and Norway; commenced in May, 1915, continued until culmination in April, 1919, with a nominal abrogation of all of Article XIII. (*Foreign Relations of the U. S.*, 1919, pp. 53, 54.)

In the correspondence between the State Department and Norway the latter attempted to avoid the abrogation of all of Article XIII, and in so doing made a suggestion of method which may have been impracticable, and might have resulted in international embarrassment. However, the reply of the State Department ment. However, the reply of the State Department was a mere indication of inability to restrict in any manner the operation of Article XIII, or to circumscribe within defined limits the consular jur-

isdiction, therein conferred, to exclude the possibility of its exercise in instances of inconsistency with the Seaman's Act of 1915. The State Department's only affirmative reaction to the Norwegian attempt to retain all portion of Article XIII consistent with the Seaman's Act was to make a serious gesture of the annulment of the entire treaty of 1827 by notice of denunciation. In treating with China the State Department was more liberal with concessions, since negotiations resulted in abrogation of only the second sentence of Article XVIII of the Treaty of 1858, as a result of Chinese request. (*Foreign Relations of the U. S.*, 1916, pp. 36-37). This conduct certainly was more in harmony with the restricted authority conferred upon the State Department by the Seaman's Act than its action in dealing with the Kingdom of Norway by threat of annulment as to the entire Treaty of 1827, which most certainly was not within the contemplation of Congress in passing the Seaman's Act of 1915.

If, as proposed by the Secretary of State in letter of May 29, 1915 (*Foreign Relations of the U. S.* 1915, pp. 6-9) informal notes were to be exchanged to execute the direction of the Seaman's Act, without the necessity of resort to the Senate for ratification, it would seem that the purpose might have been accomplished by adopting the simple expedient of delimit-

ing the consular jurisdiction prescribed by Article XIII by an agreement withdrawing from such jurisdiction prosecution of deserting seamen by arrest and imprisonment, demands of seamen for half wages in American ports and wage advancements and allotments to and by seamen in American ports. By such an expedient the Congressional instruction in the Seamen's Act to eliminate conflicting treaty provisions would have been executed and the Congressional authority would not have been exceeded. To such an expedient the Norwegian government would have been agreeable, judging by the official communications emanating from it to the State Department. By some such device the doubt and discussion in this and prior litigation might have been eliminated.

The sketchy, inadequate review of diplomatic correspondence between the State Department and the Norwegian government perhaps will serve no further than to invite careful scrutiny of the record of the negotiations. If made, it is submitted that such examination will substantiate respondent's contention that, in the main, the executive interpretation by the State Department of the unavoidable, necessary inconsistency between the Seaman's Act of 1915 and Article XIII is not embarrassing to a conclusion by this court thatt he practical application of such interpretation by the State Department upon Article

XIII was erroneous, unauthorized and ineffective. If this court is in accord with such a conclusion, it would seem to be relieved of obligation to give regard or weight to the State Department's attempted abrogation of all consular jurisdiction conferred by Article XIII.

> "That a power granted in the constitution to be exercised by a certain department of government and in a certain way, cannot be validly exercised by a treaty in disregard of the manner prescribed in the constitution."
>
> *Limitations on the Treaty-making Power* by Tucker, Sec. 373 III, pp. 427-8.

> "The action of no department of government can be regarded as a law until it shall have all the sanctions required by the constitution to make it such." (Quotation from opinion of Justice McLean in *Turner v. American Baptist Missionary Union*, Fed. Cas. 14251).
>
> *Limitations on Treaty-making Power* by Tucker, p. 49.

> "On comparing the principles which govern and decide the necessary validity of a treaty with those on which its voluntary validity depends, we cannot but perceive that the former are of a judicial and that the latter are of a political nature. That diversity naturally leads to the opinion that the former are referable to the judiciary and the latter to those departments who are charged with the political interests of the states." (Quotation from opinion by Chief Justice Jay in *Jones v. Walker*, Fed. Cas. 7507.)
>
> *Limitations on Treaty-making Power* by Tucker, pp. 54, 55.

Presumably this court, in disregard of its own rulings, will not permit departmental interpretation of constitutional segregation and limitation of powers to supersede the constitutional requirements as to the formalities of consummating and terminating treaties.

> "For the obligations of the treaty could not be changed or varied but by the same formalities with which they were introduced; or at least by some act of as high an import and of as unequivocal an authority."
>
> *The Amiable Isabella*, 6 Wheat. (U. S.) 1, 75, 5 L. Ed. 191, 209.

This court has held that under the guise of a departmental regulation or practice a statute, and inferentially a treaty, cannot be enlarged or restricted.

> "If Rule 7 is valid, the Secretary of the Interior has power to abridge and enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."
>
> *U. S. v. United Verde Copper Co*, 196 U. S. 207, 215; 49 L. Ed. 449, 452.

> "Administrative rulings cannot add to the terms of an act of Congress and make conduct criminal which such laws leave untouched. Waite v. Macy, 246 U. S. 606, 62 L. Ed. 892; U. S. v. George, 228 U. S. 14, 57 L. Ed. 712, 715; U. S. v. United Verde Copper Co., 196 U. S. 207, 215, 49 L. Ed. 449, 452."
>
> *U. S. v. Standard Brewery*, 251 U. S. 210, 220; 64 L. Ed. 229, 235.

This court has joined with inferior tribunals in giving some recognition to the general doctrine that courts would give weight to departmental or administrative interpretations relative to their duties. However, this court has likewise recognized exceptions to the doctrine.

> "It has been held in many cases that a definitely settled administrative construction is entitled to the highest respect; and, if acted on for a number of years, such consruction will not be disturbed except for cogent reasons. (Citations.) But the court is not bound by a construction so established. (Citations.) The rule does not apply in cases where the construction is not doubtful."
>
> *U. S. v. Missouri P. R. Co.*, 278 U. S. 269, 280; 73 L. Ed. 322, 378.

Whatever complexities or doubts may have been engendered by the passage of the Seaman's Act of 1915, it would seem that there is so much clarity as to the limited extent of any necessary, unavoidable inconsistency between that act and the consular jurisdiction conferred by Article XIII as to leave this court unburdened by the weight of departmental interpretation.

In dealing with certain practices of the Interstate Commerce Commission, this court has said:

> "Long continued practice and the approval of administrative authorities may be persuasive in

> the interpretation of doubtful provisions of the statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed. A failure to enforce the law does not change it. The good faith of the carriers in the transactions of the past may be unquestioned, but that does not justify the continuance of the practice."
>
> *Louisville, etc., Co. v. U. S.*, 282 U. S. 740, 759; 75 L. Ed. 672, 684.

This court has recognized as effective exception to the general rule that interpretations and constructions of administrative and executive departments are entitled to weight, excluding the rule from operation where the courts are able to say that the intent of the controlling law is clear. Respondent submits, in harmony with contention urged to this court by Joseph H. Choate years ago, that the general rule is subject to an additional exception arising in the case of interpretation by executive or administrative departments of their own authority under the constitution. It would seem that if this court exercises the power of overruling Congressional interpretation of the powers of the legislative department of government by declaring statutes, which have received the vote of Congress and met with the approval of the President, to be unconstitutional, this court should not hesitate to disregard the ill-considered conclusions of the State Department, when culminated by

an attempted abrogation of Article XIII of the Treaty of 1827, to effect a counterfeit abolition of all consular officials and functions.

In mentioning the contentions previously made before this court by eminent counsel, reference was made to the case of *Ex parte Cooper*, 143 U. S. 472; 36 L. Ed. 232, where this court, faced with an interesting question not wholly dissimilar from the present, said:

> "We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress or a treaty, and the case turns upon a question public in its nature which has not been determined by the political departments in the form of a law specifically settling it or by authorizing the executive to do so, to render judgment, 'since we have no more right to decline the jurisdiction which is given than to usurp that which is not given.' "
>
> *Ex parte Cooper*, 143 U. S. 472, 503; 36 L. Ed. 232, 242.

Turning to another point of possible attack by petitioner or query by this court, it may have been observed in the record that while petitioner suffered personal injuries in May, 1922, resulting in his alleged cause of action, libel was not filed in this cause until April 18, 1931. Apart from the abrogation of Article XIII, as asserted by petitioner, the Treaty of 1827 was effectively replaced by the Treaty with

the Kingdom of Norway signed June 5, 1928, and February 25, 1929, which was ratified by the Senate of the United States April 5, 1932. However, these dates do not make inapplicable to this controversy Article XIII of the Treaty of 1827, but rather confirm the application thereof.

By this court the doctrine has become established that as between governments treaties become operative from the date of their execution by the contracting nations, but as between individuals and as to individual rights vested before the treaty was ratified, the treaty is not considered concluded until ratified and proclaimed.

Davis v. Concordia, 9 How. (U. S.) 280; 13 L. Ed. 138;

U. S. v. Arredondo, 6 Pet. (U. S.) 691; 8 L. Ed. 457;

U. S. v. Sibbald, 10 Pet. (U. S.) 313; 9 L. Ed. 437;

Jecker v. Magee, 9 Wall. (U. S.) 32; 19 L. Ed. 571;

Dooley v. U. S., 182 U. S. 122; 45 L. Ed. 1074.

Another principle established by this court is that the abrogation of a treaty is operative only as to the future, leaving past transactions affecting individuals and their rights unmodified.

Head Money Cases, 112 U. S. 580; 28 L. Ed. 798.

By petitioner it has been intimated that because the respondent steamship "Luise Nielsen" was sold by her Norwegian owner and renamed the steamship "Taigen Maru" by her present Japanese owner, the Japanese claimant defending the libel in this cause is not entitled to the benefits of Article XIII of the Treaty of 1827, even conceding such benefits to have been available to the Norwegian owner.

Authority directly in point has not been uncovered, but on principle alone it would appear that the suggestion is unsound. This court is mindful of the nature of a maritime lien, which although actually non-existent, is the only legal right upon which petitioner claims a recovery against the respondent steamship in this cause. If petitioner ever became entitled to assert a maritime lien against the respondent steamship, that right accrued and petitioner's cause of action matured immediately upon his sustaining the personal injuries of which he complains. Petitioner's right to a maritime lien became an inherent, intangible part of the vessel itself, following her into all ports and through the hands of all owners. The record in this cause shows that the maritime lien being invisible, and the records thereof being unavailable, the present Japanese owner required of the former Norwegian owner protection in the contract of sale by way of warranty that the

vessel was "free from all debts and encumbrances." In recognition of the nature of the maritime lien and in appreciation of the effect of the warranty, the Norwegian consul at Seattle promptly intervened in the above entitled cause and protested the jurisdiction of the District Court for Washington (R. 14-19).

It is submitted that neither the petitioner nor the respondent steamship "Taigen Maru" is deprived of the rights nor freed of the obligations of the applicable laws of Norway, including the operative pertinent provisions of the Treaty of 1827.

As to another minor aspect of the limited question propounded by this court for review, petitioner has asserted that at the time of his injuries on the high seas on a return voyage from the Orient, the respondent steamship was under charter to the Asiatic American Steamship Company, an American concern, related to the vessel as owner *pro hac vice*. Like contention as to the relationship of the Asiatic American Steamship Company was made by petitioner in the litigation instituted by him in September, 1922, before the District Court of Oregon, as evidenced by the typewritten, unprinted portion of transcript of record in this cause on file with the clerk of the above entitled court, of which respondent has no copy, necessarily preventing specific reference to the facts

established in this regard. However, examination of the record made in the District Court for Oregon will show that the Norwegian owner of the respondent steamship denied that the Asiatic American Steamship Company was owner *pro hac vice*, the same denial being made by the Asiatic American Steamship Company itself when it was impleaded as respondent in *personam* by petitioner's amended libel. The record of the District Court of Oregon will also show that testimony and depositions were received by the District Court for Oregon and that thereafter libelant's petition was dismissed with costs taxed against petitioner, and in favor of the Norwegian owner and the Asiatic American Steamship Company.

Having in mind that at present this cause is before this court upon a question of jurisdiction raised in *limine*, it is submitted that on the bare assertion of petitioner that the Norwegian vessel was under demise charter to an American concern at the time petitioner's cause of action arose, which assertion was not made by affidavit until after oral ruling of the District Court for Oregon had been rendered, dismissing petitioner's libel, affording respondent no opportunity for denial, this court should concern itself solely with facts conceded in the record.

Finally, before concluding, it is appropriate that respondent especially direct the court's attention to

the history and the state of the record in this cause, in the event that after all the contentions of respondent have been considered the court should reject such contentions and should adjudicate Article XIII of the Treaty of 1827 to be inapplicable to this controversy. In that situation respondent submits that this cause should not be remanded to the District Court for Washington, but should be remanded to the Circuit Court of Appeals for the Ninth Circuit, with instructions to settle other jurisdictional defenses urged by respondent in that court, which as yet have not been decided in the lower appellate court because of its conclusion as to the applicability of the Treaty of 1827, and because, as stated in its opinion, it became "unnecessary to consider other points argued in the briefs of respondent.". (R. 46.)

Even though this court has denied respondent's motion to print the entire typewritten transcript of record in this cause on file with its clerk, there still remains in form for convenient reference in the affidavit supporting such motion to print the full record, and in the transcript of record which has been printed, sufficient to disclose the nature of the other jurisdictional defenses which have been advanced by respondent, and which respondent submits are sufficiently meritorious to be subjected to adjudication by the Circuit Court of Appeals for the Ninth Circuit.

Former opinions of this court in situations more or less closely analogous have created precedent for the return of this cause to the Circuit Court of Appeals. Certainly such precedents should be applicable since the writ of certiorari granted by this court has been "limited to the question of the application to this controversy of the Treaty of Commerce & Navigation of July 4, 1827." (R. 47.)

Lutcher & Moore Lbr. Co. v. Knight, 217 U. S. 257: 54 L. Ed. 757, 762;

Brown v. Fletcher, 237 U. S. 583, 588; 59 L. Ed, 1128, 1131;

Liberty Oil Co. v. Condon National Bank, 260 U. S. 235, 245; 67 L. Ed. 232, 237;

U. S. v. Brims, 272 U. S. 549, 555; 71 L. Ed. 403, 405.

CONCLUSION

Notwithstanding respondent's suggestion as to the final order of this court to meet the possibility of ruling adverse to respondent, on the whole record and all legal propositions considered, it is submitted that Article XIII of the Treaty of 1827 is applicable to the present controversy, and should be given recognition with resultant dismissal of petitioner's libel.

Respectfully submitted,

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